

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

ORIGINAL

77-4079

United States Court of Appeals
FOR THE SECOND CIRCUIT

NEW YORK STATE COMMISSION ON
CABLE TELEVISION,

Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

MANHATTAN CABLE TELEVISION, INC. and NEW
YORK STATE CABLE TELEVISION ASSOCIATION,

Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENOR MANHATTAN
CABLE TELEVISION, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
: NEW YORK STATE COMMISSION ON
: CABLE TELEVISION, :
: Petitioner, :
: -against- :
: FEDERAL COMMUNICATIONS COMMISSION, : Docket No. 77-4079
: Respondent, :
: MANHATTAN CABLE TELEVISION, INC., :
: and NEW YORK STATE CABLE TELEVISION :
: ASSOCIATION, :
: Intervenors. :
-----X

On Petition for Review of an Order of the
Federal Communications Commission

BRIEF FOR INTERVENOR
MANHATTAN CABLE TELEVISION, INC.

Preliminary Statement

Intervenor Manhattan Cable Television, Inc.
(MCTV) submits this brief in support of the ruling of
Respondent Federal Communications Commission (hereinafter
"FCC" or "Commission"), in which the Commission construed
a limited grandfathering provision in its Rule setting
maximum limits on the state and local fees which can be
levied on cable television systems.

Question Presented

Whether the Federal Communications Commission reasonably interpreted §76.31(b) [47 C.F.R. §76.31(b)] of its own rules and regulations, which prescribe the maximum fees a cable television company may pay to state and local regulatory bodies, so as to prohibit the imposition of additional fees by the New York State Commission on Cable Television (CCT) upon cable television systems such as Manhattan Cable Television, Inc. which were doing business prior to the adoption of §76.31(b) and which were already paying fees in excess of the maximums allowed under the Rule.

Position of MCTV

MCTV is a cable television company which has been operating in the City of New York since 1967. It participated in the proceedings before the FCC and supports the Commission's interpretation of its grandfather provision. On April 26, 1977, this Court granted MCTV's motion to intervene in this proceeding.

Rule Involved

The Rule at issue is 47 C.F.R. §76.31(b) which is set out in full on p.-i- of the Addendum attached to this brief.

Statement of the Case

MCTV adopts and relies on the counterstatement of facts contained in the brief of the FCC.

Summary of Argument

MCTV has been operating its cable television system in New York City since 1967 pursuant to a franchise agreement with the City. A franchise is, in essence, the permission of a local authority granted to a corporation to make use of the public streets and ways in the conduct of its business. MCTV is only one of various systems in New York State which have been operating their facilities pursuant to franchises from local regulatory authorities. Comparable to MCTV, and pursuant to the terms of their franchises, the systems throughout the country pay franchise fees to local municipal and state regulatory authorities.

The FCC assumed regulatory authority over all cable television systems in 1966. The Supreme Court upheld this regulatory authority in United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

In 1972, the FCC adopted a comprehensive set of cable television rules in its Cable Television Report and Order, 36 F.C.C. 2d 143 (1972)(hereinafter "1972 Order"). These Rules required a cable system to obtain a Certificate of Compliance from the FCC before it could commence opera-

tions. The Rules also provided for certain minimum requirements that must be included in any given franchise in order for such Certificate to be issued. These Rules became operative as of March 31, 1972.

Pertinent to this proceeding is §76.31(b) [47 C.F.R. §76.31(b)] of the Rules which at the time of the initial decision in this proceeding stated:

(b) Franchise fees shall be no more than 3 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period or March 31, 1977, whichever occurs first. [Emphasis supplied.]*

At issue herein is the meaning of the very last sentence of the section which creates a special class of

* The grandfather period has just recently been changed by the FCC to a period of fifteen years from the initial grant of the franchise or the termination date of the franchise, whichever occurs first. FCC News Release No. 89569 "Cable Certification and Franchise Standards Streamlined (Docket 21002)" (September 26, 1977).

cable systems which had commenced operations prior to March 31, 1972. These are commonly referred to as "grandfathered systems".

Petitioner herein argues that the "plain" meaning of Section 76.31(b) gives it the right to impose unlimited additional fees on grandfathered systems during the grandfather period. The FCC disagreed, holding that additional fees may not be imposed during the grandfather period. MCTV believes such interpretation to be correct.

In the 1972 Order, the FCC indicated that it was permitting grandfathered systems a period of non-compliance with its Rules in order to avoid minor dislocations in existing franchise operations and until such systems and the municipalities could adjust to the new Rules.

As of March 31, 1972, MCTV was paying fees to the City of New York in excess of the five percent ceiling contained in §76.31(b) and is continuing to pay such fees. On January 1, 1973, approximately nine months after §76.31(b) was promulgated, most of Article 28 of the New York Executive Law became operative. Section 817 of the Executive Law became effective May 24, 1972. Under said Article 28, petitioner (CCT) was created to regulate the operation of cable television systems in the State of New York. Section 817 requires such systems to pay a fee to CCT of up to one percent (later increased to two percent) of such system's revenues.

Since 1972, a number of new cable television systems have become operative in this state. The total of the fees these systems pay to state and local authorities are subject to the three to five percent ceiling of §76.31(b) because they are not grandfathered. MCTV has objected to the payment of these fees required by Section 817 on the ground that no additional fee may be imposed on a grandfathered system which, as of March 31, 1972, was already paying fees in excess of the three to five percent ceiling. The FCC sustained this position in the declaratory ruling which is here under review.

CCT contends that because the last sentence of §76.31(b) provides that the three to five percent ceiling is inoperative with respect to grandfathered systems, it may validly impose and increase fees on such systems without restriction, at any time until March 31, 1977 or the end of the then current franchise period. Rejecting this contention, the FCC interpreted its Rule to mean that when a grandfathered system was already paying fees, as of March 31, 1972, in excess of the prescribed limitation, additional fees could not be imposed.

MCTV concurs in the FCC's interpretation of its Rule. The purpose of the grandfathering contained in §76.31(b) is to avoid the disruption which would be caused by immediate application of the Rules to grandfathered systems. Thus,

local municipal or state fees in excess of five percent, which were imposed on grandfathered systems prior to March 31, 1972, remain valid. But it would be totally at variance with the FCC's purpose in adopting the grandfather clause and would promote unreasonable discrimination between grandfathered and non-grandfathered systems if local authorities could impose additional fees on grandfathered systems after March 31, 1972, while being prohibited from imposing the very same fees on systems which commenced operation after that date.

The FCC's interpretation of §76.31(b) is clearly consistent with the language and purpose of that section. Petitioner's proffered construction of §76.31(b) on the other hand, would have the effect of leaving a whole series of grandfathered systems across the nation almost totally outside federal protection. Both the Rule's intent and its language do not support this distorted construction. The section simply states that the three to five percent ceiling will not be applied to grandfathered systems for the interim period. Consistent with §76.31(b), the FCC does allow fees in excess of five percent that were imposed prior to March 31, 1972, to remain in effect throughout the entire grandfather period. That section, however, does not state--as CCT would argue--that local regulatory authorities may impose new fees at any time during this period. There is absolute-

ly nothing in §76.31(b), or anywhere else in the FCC's Rules or in its policy adopting and construing its grandfather provisions, which supports CCT's position.

Clearly, the FCC's declaratory ruling here under review is totally consistent with the purview of §76.31(b). It is only when a federal agency's interpretation of its own regulation is so unreasonable as to be arbitrary that its ruling will be reversed. Such is manifestly not the case with respect to the matters before this Court; and, accordingly, the Petition for Review should be dismissed.

I

THE REASONABLE INTERPRETATION
BY THE FCC OF ITS OWN REGULA-
TION IS BINDING ON THIS COURT

In passing on the validity of an administrative agency's action, the courts are bound by the Administrative Procedure Act to affirm the agency's position unless it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The Supreme Court precisely delineated the impact of this section upon the courts when it held, in Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971):

...the ultimate standard of review is a narrow one. The Court is not empowered to substitute its judgment for that of the agency.

See also Retail, Wholesale & Department Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972); Aguayo v. Richardson, 473 F.2d 1090 (2d Cir. 1973), cert. denied sub nom. Aguayo v. Weinberger, 414 U.S. 1146 (1974); Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974).

The courts have firmly established that regulatory agencies, including the FCC, have wide latitude in the interpretation of their own statutes and regulations and great deference must be given to their conclusions. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Udall v. Tallman, 380 U.S. 1 (1965); Immigration and Naturalization Service v. Stanisic 395 U.S. 62 (1969); Daly v. United States, 286 F.2d 146 (7th Cir.), cert. denied, 386 U.S. 831 (1961); Committee for Open Media v. FCC, 533 F.2d 1 (D.C. Cir. 1976); Iacopi v. FCC, 451 F.2d 1142 (9th Cir. 1971). The interpretations of the agency are controlling as long as they are reasonable, and this is true regardless of whether such interpretation may not be as reasonable as some other interpretation, or even if this Court would have reached a different conclusion if the issue had been raised first in a judicial proceeding rather than before the administrative agency. Udall v. Tallman, supra; Unemployment Compensation Commission Territory of Alaska v. Aragan,

329 U.S. 142 (1946).^{1/}

The United States Supreme Court has set the benchmark against which the validity of an interpretation is measured when, in upholding the administrative interpretation of a regulation of the Office of Price Administration, in Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945), it stated:

. . . the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

^{1/}

See also Clarkson Constr. Co. v. OSHRC, 531 F.2d 451 (10th Cir. 1976); Florida Sugar Cane League, Inc. v. Usery, 531 F.2d 299 (5th Cir. 1976); Lucas Coal Co. v. Interior Bd. of Mine Operation Appeals, 522 F.2d 581 (3d Cir. 1975); Brennan v. OSHRC, 513 F.2d 713 (8th Cir. 1975); Brennan v. OSHRC, 513 F.2d 553 (10th Cir. 1975); Budd Co. v. OSHRC, 513 F.2d 201 (3d Cir. 1975); Perine v. William Norton & Co., 509 F.2d 114 (2d Cir. 1974); Brennan v. OSHRC, 501 F.2d 1196 (7th Cir. 1974); Philbeck v. Timmers Chevrolet, Inc., 499 F.2d 971 (5th Cir. 1974); Brennan v. Southern Contractors Serv., 492 F.2d 498 (5th Cir. 1974); Shell Oil Co. v. FPC, 491 F.2d 82 (5th Cir. 1974); Board of Directors & Officers, Forbes Fed. Credit Union v. National Credit Union Admin., 477 F.2d 777 (10th Cir. 1973); Roy Bryant Cattle Co. v. United States, 463 F.2d 418 (5th Cir. 1972); Crowley v. Merce, 461 F.2d 614 (5th Cir. 1972); Allen M. Campbell Co. v. Lloyd Wood Constr. Co., 446 F.2d 261 (5th Cir. 1971); Western Union Telegraph Co. v. United States, 217 F.2d 579 (2d Cir. 1954).

a) The Interpretation Of The Grandfather
Provision Of §76.31(b) Is Reasonable.

The interpretation of §76.31(b) by the FCC is both reasonable and consistent with the legislative history of the regulation. By its own terms, the section sets a maximum on fees payable by a cable system but permits the grandfathered system to continue to pay existing fees in excess of that maximum for a limited period of time. The section, however, is silent on the right of state and local governments to either raise such fees or add new ones during the grandfathered period. CCT argues that such silence authorizes the imposition of unlimited new fees on grandfathered systems. However, the FCC disagreed, holding that during the interim period grandfathered systems could continue to pay the same fees they were paying on the date the rule was adopted, but such fees could not be increased beyond the limits of such Rule. There are very valid reasons why this is a rational conclusion.

It prevents grandfathered systems from being penalized through the imposition of heavy fees as against non-grandfathered systems which are protected by the limitations of §76.31(b). CCT's position would

allow the imposition of additional heavy fees at any time during a period of fifteen years or until the franchise expired, whichever occurred first. The FCC gave grandfathered systems the right to rely on the assumption that during such period their fees would be stable. The effect, however, of CCT's position would result in an unjustified discrimination against grandfathered systems as opposed to non-grandfathered systems which are able to plan and move forward with relative assurance about their financial obligations.

Moreover, the FCC has already held that any increase in the franchise fee of a grandfathered system is a "significant" amendment to the franchise, requiring an automatic renegotiation of the entire franchise to bring it into compliance with FCC rules. Clarification of Cable Television Rules and Notice of Proposed Rule Making and Inquiry, 46 F.C.C.2d 175 (1974) (hereinafter "Clarification Order"). Under this decision, if CCT's position is upheld, MCTV will be immediately forced to renegotiate its complex multi-provision franchise with the City, obtain state confirmation, and then obtain certification from the FCC to continue operating, a procedure it is presently

exempt from because of its grandfather status. New York State Commission On Cable Television, 62 F.C.C.2d 975 (1977) (hereinafter "Reconsideration") A. 17. 2/ Thus, the Commission's interpretation, which prevents such an upheaval, is consistent with its attempt to protect grandfathered systems because of ". . . the equities involved in a cable operator's justifiable reliance on specific franchise terms negotiated before he was placed on notice of the 1972 Commission decision." Id. A. 22.

- b) The Interpretation Is Consistent With The Legislative History Of §76.31(b) And The FCC Decisions Regarding Similar Grandfather Clauses.

Finally, the interpretation is also completely consistent with the legislative history and intent underlying the adoption of §76.31(b), is an accurate implementation of that intent, and is further consistent with other grandfather clauses of the FCC and the

2/ CCT's position would also require recertification of all other operating systems previously certified on the basis of their prior fees.

concept of grandfathering in general.

As the Court held in United States v. Miller, 303 F. 2d 703, 707 (9th Cir. 1962), cert. denied, 371 U.S. 955 (1963), it is fundamental that

. . . any regulation should be construed to effectuate the intent of the enacting body. Such intent may be ascertained by considering the language used and the overall purpose of the regulation, and by reflecting on the practical effect of the possible interpretation.

See also Baldrige v. Hadley, 491 F.2d 859 (10th Cir.), cert. denied, 417 U.S. 910 (1974); Alaska Interstate Company v. McMillian, 402 F.Supp. 532 (D. Del. 1975).

The reasonableness of the FCC interpretation of §76.31(b) must be measured against the purpose of adopting the section. Udall v. Tallman, supra; Committee For Open Media v. FCC, supra. And when a regulation does not expressly address itself to a particular issue, such as the omission in §76.31(b) of whether state and local governments can impose additional fees during the grandfather period, then the Court must discern the applicable legislative intent. As the Court explained in Montana Power Company v. FPC, 445 F.2d 739, 746 (D.C. Cir. 1970), cert. denied, 400 U.S. 1013 (1971):

. . . The court must discern the applicable legislative intent by what is necessarily an act of projection-- starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before [it].

The objective of the Commission's regulation of cable television has always been " . . . how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of [this] developing communications technology for the public" CATV, 15 FCC. 2d 417 (1968). This goal was re-emphasized by the FCC in its adoption of its 1972 Rules, which were comprehensive, covering almost every aspect of the cable industry. Cable Television Report and Order, 36 F.C.C. 2d 143 (1972) (hereinafter "1972 Order"). Analysis of the rationale underlying the Commission's regulations, and revisions thereof, indicates that, while the FCC recognized the desirability of local regulation, nevertheless, consistent with its own responsibility to develop a national communications policy, there were certain areas where it determined that federal protection was necessary to prevent excessive or burdensome regulation at the local level. Id. 207. One of the most important of these areas was the franchise fees which cable systems were obligated to pay.

The FCC had documented a trend towards constantly increasing fees that, unless checked, could prevent cable from ever reaching its full potential. Thus, it held in "a matter of great importance" that "high local

franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy." Id. 210-211. Although the Commission recognized the necessity for permitting the continuance of certain inconsistencies with its new rules for the limited transition period, there are no indications anywhere in either the Rules or the 1972 Order that it intended to allow the imposition of additional fees or the creation of additional inconsistencies after the new Rules became effective. Otherwise, the Commission's stated objective of early and complete compliance to develop a national communications policy would have been significantly undermined.

The purpose of the grandfather provisions as applied to the franchise standards of \$76.31 was to

relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause. Id. 210 ^{3/}

The use of the word "dislocations" reflected a clear intent that the grandfather clause was to be

^{3/} A virtually identical reason was given in the "Letter of Intent", which the Commission sent to the Chairmen of the House and Senate Subcommittees on Communications in August of 1971 and which constituted the Commission's tentative conclusions on the proposed rules. Id. 277.

used to prevent the "dislocation" of an existing situation^{4/} and not to permit the creation of more inconsistencies for grandfathered systems. The right to impose new fees which CCT now seeks would itself cause a serious "dislocation" to the cable system, contrary to the whole purpose of the grandfather provision.

Grandfathering was intended as much, if not more, to ease the burden of the transition to the new Rules upon the cable system as well as upon the franchising authorities. See, Minnesota All-Channel Cablevision, Inc., 34 P & F Radio Reg. 2d 1485 (Cable Bureau 1975); Alabama Media Project et al., 53 F.C.C. 2d 741 (1975). The grandfathering provision demonstrated the FCC's extreme sensitivity to the equities of the cable operator. To permit the imposition of new and unanticipated fees on the cable operator denies his equities, rather than recognizes them.^{5/}

^{4/} Webster's Third New International Dictionary (1961) defines "dislocation" as a "disruption of an established order". [Emphasis supplied].

^{5/} The FCC also permitted the grandfathering of pre-1972 franchises even if the cable system had not commenced operation by the grandfather date provided that the franchise was in "substantial compliance" with its new rules. In discussing this policy, the Commission, in CATV of Rockford, Inc., 38 F.C.C. 2d 10, 15 (1972), reconsideration denied, 40 F.C.C. 2d 493 (1973), stated: "Equity required this--to change the rules of the game and tell the franchisee to again run the gamut of the franchising process would be patently unfair." [Emphasis supplied].

Moreover, grandfathering prevented a cable operator from being treated more harshly than a new operator. A non-grandfathered cable system could not be charged a fee of more than five percent of its gross revenues because of the limitations of §76.31(b) applied to it from the beginning. In contrast, a grandfathered system would be faced with the prospect of significant increases in fees for a period conceivably of up to fifteen years. Yet it is the grandfathered system, and not the new system, which is locked into a substantial investment and which, unlike the new system, cannot avoid paying the increased fees by declining to go into business.

Applying CCT's interpretation directly to MCTV proves how unfair CCT's position is to grandfathered systems. MCTV has invested more than 35 million dollars in its cable system since it began operation in 1967. It pays 5.6% of gross revenues to the City, despite the fact that it has accumulated losses of more than 18 million dollars. CCT would now require it to pay a combined fee of 7.6% of such revenues. Based on its revenues for fiscal year 1976, MCTV would pay \$255,000 more in one single year than it would if it was a non-grandfathered cable system.

Quite obviously then, MCTV and other similar grandfathered systems in New York State would be hard-pressed to become an effective part of the FCC's national communications policy.^{6/}

CCT argues that its interpretation of §76.31(b) is supported by the meaning of the grandfather provision in §76.31(a). 47 C.F.R. §76.31(a). CCT tries to draw a parallel between the two sections and states that the language in (a) is almost identical to the language of (b).^{7/}

6/ See generally, Supplementary Joint Appendix, 88, 89, 98, 99.

7/ §76.31(a) sets forth both the standards established by the FCC that have to be met by the municipality in granting a franchise and certain provisions which actually must be included in the franchise itself. All these provisions were recently rescinded as mandatory requirements by the Commission in an order which shall become effective on November 15, 1977. FCC News Release No. 89569, "Cable Certification And Franchise Standards Streamlined (Docket 21002)" (Sept. 26, 1977).

The relevant part of the grandfather provision in present §76.31(a), to which CCT refers, states:

Provided, however, That, in an application for a certificate of compliance, consistency with these requirements shall not be expected of a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period or March 31, 1977, whichever occurs first . . . [Emphasis in original].

It then reasons that the

use of the word "system" throughout §76.31(a) and (b) shows that the rule exempts, and was meant to exempt, cable television systems in operation prior to March 31, 1972 from all provisions of §76.31. CCT Brief, 10 - 11.

Although CCT does not so state, the logical result of its argument is the irrational conclusion that, during the grandfather period, the state or local franchising authority could modify a grandfathered franchise any way it chose, regardless of FCC rules, on the theory that none of the provisions of §76.31(a) applied to a grandfathered system. In other words, the grandfathered systems become a class of systems totally outside federal protection during the grandfather period. However, the history and application of §76.31(a) demonstrate that the Commission intended the exact opposite of what CCT is urging.

In its Clarification Order the Commission held that any significant amendment of a grandfathered franchise automatically terminated the grandfathering and required the system to immediately obtain from the Commission a certificate of compliance with all of its new rules. The Commission carefully delineated those matters that it considered to constitute significant amendments, specifically including "a change

in . . . franchise fees" and further held that state and local fees would be added together to determine compliance with the limitations of §76.31(b). Clarification Order, supra, 197, 202.^{8/} The Commission then stated:

The reason we are taking this approach to substantial changes in franchises should be obvious. Our entire program of certification would be meaningless if significant alterations, potentially contrary to our rules, could be made in a franchise after we had certified that it complied with federal regulations. Any substantial change in a franchise, of course, would automatically end any "grandfathering" rights regarding other provisions in the same franchise. Our "grandfather" of pre-March 31, 1972 franchises was meant to give franchising authorities a reasonable amount of time in which to bring their franchises into compliance. If they are now changing provisions in the franchises, they also have had ample opportunity to acquaint themselves with the new rules and will be expected to comply with all of our franchise requirements". Id. 197. [Emphasis supplied].

Despite this statement, CCT argues that §76.31, in effect, gives it the unilateral right to terminate MCTV's grandfather rights (which were federally granted

^{8/} Cf. Mountain States Video, 52 F.C.C. 2d 509, reconsideration denied, 54 F.C.C.2d 937 (1975); Alabama Media Project, et al., supra.

in the first place), and force the cable system to secure immediately an entirely consistent franchise, including a negotiated reduction in fees payable to the City. That position totally destroys the grandfathering contained in §76.31 and, in the vernacular, means that the FCC was wasting its breath.

- c) The FCC's Interpretation Of §76.31(b) Is Perfectly Consistent With Its Interpretation Of Similar Grandfather Clauses In Other Parts Of Its Rules.

The Commission has also adopted grandfather clauses in other areas of its cable rules and repeatedly construed these clauses in the same fashion in order to exempt only those inconsistencies existing at the time its new rules were adopted.

For example, in 1966, when the FCC adopted its first comprehensive regulations for cable television systems,^{9/} it included a grandfather clause and expressly ruled that the clause would not permit any additional inconsistencies beyond those existing at the time of

^{9/} CATV, 2 F.C.C. 2d 725 (1966).

the adoption of the new rules. The 1966 Rules required that an evidentiary hearing be held before a cable system could extend a television broadcast signal beyond its primary coverage area and into one of the hundred largest television markets. The Commission grandfathered cable systems that were carrying inconsistent signals prior to the date on which the Commission issued its first notice of the proposed restrictions. Significantly, the Commission stated that

any addition of a new distant signal to an existing system in the top 100 markets would come within the [newly-adopted] major market policy [thus requiring a hearing]. ^{10/}

The FCC's current signal carriage rules (47 C.F.R. §§76.57-76.65) restrict the number and type of broadcast signals a cable system may carry, but contain a grandfather provision which permits continued carriage of inconsistent signals if the signals were being carried in a community prior to 1972. However, the

^{10/} Id. 785. The FCC also prohibited the expansion of a grandfathered system into other distinct areas or suburbs of a community without an evidentiary hearing.

Commission has refused to permit cable systems carrying grandfathered signals not otherwise allowed to expand their service to new communities after 1972 unless the systems comply fully with the signal carriage rules in the new communities. Lima Cablevision Co., 52 F.C.C. 2d 1016 (1974); Daniels Properties, Inc., 51 F.C.C. 2d 451, reconsideration denied, 53 F.C.C. 2d 813 (1975). 11/

Not only has the FCC applied the grandfather provisions of its cable television rules to prohibit new inconsistencies for grandfathered cable television systems, but it has also adopted the same philosophy in interpreting the grandfather provisions in other parts of its rules. The Commission's television multiple ownership rules prohibit ownership of two

11/ A further example is Section 76.501 (47 C.F.R. §76.501), which prohibits common ownership of a television station and a cable system if the primary area covered by the television station overlaps the area served by the cable system. Subparagraph (b) of the rule, in language virtually identical to §76.31(b), provides that the prohibition is not effective until August 10, 1977, "as to ownership interests . . . in existence on or before July 1, 1970. . . ." The Commission has construed this grandfather clause to prohibit increases in ownership interests during the period before August 10, 1977, even though the original interest was in existence before the 1970 grandfather date. Meyer Broadcasting Company, 54 F.C.C.2d 224 (1975).

television stations where there is an overlap of the primary service contours of the stations.^{12/} Specifically, the Commission has grandfathered only those overlaps which already existed, permitting no addition whatsoever in the degree of overlap.^{13/}

Similarly, in its rules restricting antenna height and transmitter power for FM radio broadcast stations^{14/} the Commission grandfathered stations which were out of compliance on the date the new rules were adopted but refused to allow any increases in either broadcast power or the coverage contour of such station without full compliance with such new rules.^{15/}

From the foregoing, it is evident that the Commission has applied its grandfather provisions in a consistent manner in all areas of its rules. The purpose of its grandfathering has generally been to

^{12/} 47 C.F.R. §73.636.

^{13/} Id. Note 8. See also Lee Enterprises, 58 F.C.C. 2d 280 (1976).

^{14/} 47 C.F.R. §73.211

^{15/} 47 C.F.R. §73.211(d)

allow a situation which is inconsistent with newly adopted rules to continue for a limited period of time, provided that the inconsistency is not enlarged or modified. MCTV knows of no instances, nor has CCT cited any, where the Commission has interpreted its grandfather provisions to permit new inconsistencies to be created and new exemptions granted after a rule is adopted.^{16/}

- d) FCC Interpretations Of Its Own
Grandfather Clauses Are In Accord
With Judicial Interpretations Of
Similar Provisions.

In addition, the courts themselves have held that the purpose of grandfather provisions is to preserve the status quo. One of the most lucid statements of purpose was made by Judge Learned Hand

^{16/}

MCTV has been unable to find a single instance under §76.31(a) and (b) in which the Commission has ever been requested to permit further inconsistencies in a cable television franchise during the grandfather period. This fact is strong inferential evidence that the Commission and the cable industry assumed from the date of adoption of the cable rules that such a change was not permitted by the Commission's rules and policies.

in Crescent Express Lines, Inc. v. United States, 49 F.Supp. 92 (S.D.N.Y.), aff'd, 320 U.S. 401 (1943).

The case involved a grandfather clause in the Motor Carrier Act of 1935, which allowed motor carriers in operation on a certain date to continue such operations without a detailed showing of public convenience and necessity. Judge Hand stated:

[T]he "Grandfather Clause"--was apparently inserted to avoid the hardship which would result from forcing a carrier to justify his existing business in terms of public convenience. It was meant to accept the motor vehicle system as it was; it recognized as vested such rights as had grown up before Congress asserted any public interest in motor transportation; and consistently, the rights protected should be measured by past user. Strictly, it was therefore an anomaly to give carriers who secured certificates under the "Grandfather Clause", the privilege of indefinite quantitative expansion. The only reason for dispensing with the Commission's supervision-- i.e. the injustice involved in stopping a business which had grown up in reliance upon the failure of Congress to act-- ceased with the protection of the business as it stood when regulation began; . . . [I]f the holders of such certificates have the same unlimited power to change the quality of their service, as they have to add to its quantity, Congress, in an effort to prevent the unduly harsh impact of a new system, created a favored group of carriers, substantially free from all regulation.. . . So far at least, it is safe to say that Congress did not mean to go. 49 F.Supp. 92, 94-95 [Emphasis supplied].

Similarly, in Noble v. United States, 45 F.Supp. 793 (D. Minn. 1942), aff'd, 319 U.S. 88 (1943), a three-judge district court interpreted the grandfather provision of another section of the Motor Carrier Act. The Court concluded:

Undoubtedly, the statute contemplated actual operations on the crucial date and the grandfather rights are measured by the character and extent of the service then being rendered. 45 F.Supp. 793, 800. [Emphasis supplied]. 17/

Thus, the FCC's unbroken chain of consistent interpretations of the purpose and effect of its own grandfather provisions plus court decisions interpreting other grandfather provisions, which decisions are in accord with the FCC's reasoning, reflect the lack of substance in CCT's position. To accept CCT's argument and hold that the grandfather clause of §76.31(b) allows state and local governments to create additional inconsistencies during the grandfather period is unsound in theory and practice, and demonstrably contrary to the Commission's intent.

17/ See also Chicago, St. P. & O. Ry. Co. v. United States, 50 F.Supp. 249, 252 (D. Minn. 1943): "The 'grandfather' clause . . . contemplated that a common carrier by motor vehicle should retain the place in the national transportation system which he occupied on June 1, 1935, and that the rights granted him to continue operations without proof of public convenience and necessity should equal, but not exceed, the actual service being rendered by him on that date."

II

THIS COURT IS NOT BOUND
TO INTERPRET §76.31(b)
IN A STRICT FASHION AS
PROFFERED BY CCT

The Commission interpretation of §76.31(b) is not inconsistent with a literal reading of the section because the section is completely silent on the right of state and local authorities to impose additional fees during the grandfather period. However, even if, as CCT alleges, a literal reading would allow the imposition of such fees, this Court need not adopt such position.

It is well settled that a court is not bound to make a literal interpretation of a regulation where it results in a conflict with legislative intent, manifest injustice, or absurdity.^{18/} This Court, itself, follows such established principle. In Perine v. William Norton & Company, Inc., 509 F.2d 114 (2d Cir. 1974), this Court rejected a literal interpretation of Rule 16b-2 promulgated by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934. The Court's

^{18/} CCT acknowledges this principle at p. 12 of its brief.

position was precisely stated:

The question, therefore, is whether we should confine ourselves to the literal language of Rule 16b-2(a)(3) or be guided by Learned Hand's observation that "it is commonplace that a literal interpretation of the words of a statute is not always a safeguard to its meaning." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F. 2d 487, 489 (2d Cir. 1960). We prefer to look behind the language of the rule to the drafter's purpose. "There is no surer guide in the interpretation of a statute than its purpose when that is sufficiently disclosed; nor any surer mark of oversolicitude for the letter than to wince at carrying out that purpose because the words used do not formally quite match with it." Federal Deposit Ins. Corp. v. Tremaine, 133 F. 2d 827, 830 (2d Cir. 1943) (L. Hand, C.J.). 509 F. 2d 114, 119. [Emphasis supplied].

See also United States v. Public Utilities Commission of California, 345 U.S. 295 (1953).

Again, this Court, in Knapp v. McFarland, 462 F. 2d 935, 939 (2d Cir. 1972), held that the function of the Court in construing a statute

. . . is to give effect to the Legislature's intent, and where a literal reading leads to an illogical result, the tempering influence of reasonable construction must be applied. [Emphasis supplied].

This same principle of construction has been applied by the courts to both the statutory provisions of the Communications Act of 1934 (47 U.S.C. §1 et seq.), and the regulations of the FCC itself. Transcontinent Television Corporation v. F.C.C., 308 F. 2d 339 (D.C. Cir.

1962); Committee for Open Media v. F.C.C., supra.^{19/} In upholding an interpretation by the FCC of a provision of the Communications Act of 1934, the Court in Transcontinent adopted the language of Lynch v. Overholser, 369 U.S. 705 (1962), when it said:

The decisions of this Court have repeatedly warned against the danger of an approach to statutory construction which confines itself to the bare words of a statute [Citations Omitted] . . . for "literalness may strangle meaning . . . [Citations Omitted]" 308 F. 2d 339, 342-343.

See also, Board of Directors and Officers, Forbes Federal Credit Union v. National Credit Union Administration, 477 F. 2d 777 (10th Cir. 1973); Markham v. Cabell, 326 U.S. 404 (1945).^{20/}

^{19/} In Transcontinent, the Court affirmed the FCC's interpretation that its deletion of a VHF television channel at the completion of the station's license period did not constitute a modification of an existing license thus mandating a public hearing otherwise required by §316 (a) of the Communications Act.

In Committee for Open Media, the Court affirmed an FCC opinion granting grandfather status under its rules to a cable system serving less than 50 subscribers even though the grandfather provision only applied to "cable television systems" defined to exclude systems serving fewer than 50 subscribers.

^{20/} In Forbes Federal Credit Union, the Court affirmed an agency interpretation denying credit to a member of the armed forces even though the regulation permitted such credit provided such member was "eligible to receive services" from a military base. The Court agreed with the agency's conclusion which read into the regulation the requirement that the member be already receiving services in order to obtain credit.

In Markham, the Supreme Court ignored the express language of the Settlement of War Claims Act of 1928 which barred claims for money owed unless the debt was incurred prior to 1917 and permitted a claim for debt which arose just prior to World War II.

a) The Purported "Plain" Meaning of
§76.31(b) Leads To Inconsistent,
Illogical and Absurd Results.

CCT asserts that the "plain" language of §76.31(b) grandfathers systems and not fees and this permits imposition of unlimited fees on grandfathered systems during the interim period. By this strict interpretation of this section, CCT urges this Court to adopt a construction of §76.31(b) which leads to absurd, illogical and inconsistent results.

Grandfathering the "systems" without their "fees" makes §76.31(b) meaningless. The grandfather clause in both (a) and (b) of §76.31 would exist in a vacuum without regard to any aspect of the system's operation and this means, as previously shown, that these systems would be almost totally outside federal protection against excessive state and local demands. Moreover, the idea that the FCC intended to permit unlimited fees to be levied against grandfathered systems for up to fifteen years after it found, in 1972, that cable systems were already subject to high, burdensome fees is unsupportable.

In a further attempt to support its restrictive interpretation, CCT states that regulations should

be interpreted to avoid constitutional problems. It then urges that affirmance of the FCC interpretation would create a constitutional question of impairment of contract. Because of the wording of §818 of Article 28 of the New York Executive Law, CCT claims that, if the fee payments of grandfathered systems are, indeed, frozen, CCT nevertheless has the right to take its 2% from the money such system is obligated by contract to pay the municipality.^{21/} Thus, argues CCT, affirmance of the FCC position leads to the issue of whether the state has the right to constitutionally take from the City those moneys which the City is otherwise contractually entitled to receive.

This reasoning is circular because it is the State's own interpretation of §818 that raises a constitutional problem and not the application of §76.31(b). It is questionable that §818 has the meaning CCT

^{21/} New York State Executive Law § 818, 18 McKinney's Consolidated Laws, § 818 provides:

Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax, or charge, provided that any such fee, tax or charge when added to the amount payable to the commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal law, rules or regulations.

ascribes to it concerning the allocation of fees in excess of the federal maximums. The State Courts must determine that. As the FCC correctly held in its Reconsideration:

In the declaratory ruling we were attempting to indicate that the one plausible interpretation of the New York Law [that the municipal fee yield to the State fee] would not appear to be inconsistent with our Rules. Nevertheless, we should repeat that the interpretation of state law is for the state courts to resolve. The apportionment of the permissible fee between the state and local governments is a matter for the New York courts. Additionally, although we previously stated that our opinion might have to be revised in light of another interpretation of the state law by the state court, it would not appear that any interpretation would affect our holding herein. New York State Commission On Cable Television, 62 F.C.C. 2d 975, 979-80 (1977). [Emphasis Supplied.]

No one can reasonably predict how the New York Courts will interpret §818 or if, indeed, the issue will ever come before them. This Court should not be deterred from giving effect to the sensible interpretation of §76.31(b) by the FCC on the basis of a speculative and actually irrelevant argument. To do otherwise would "contravene the established policy of the federal courts not to anticipate a question of constitutional law in

advance of the necessity of deciding it.'" Wagman v. Arnold, 257 F. 2d 272, 277 (2d Cir. 1958), quoting Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioners, 113 U.S. 33,39 (1885).^{22/} Further, when one of the constructions of a statute which the state courts might adopt would alleviate any constitutional conflicts, the court should abstain from deciding the constitutional issue. See Carey v. Sugar, ____ U.S. ____, 96 S. Ct. 1208 (1976).

However, the position of CCT does create a very different but substantial constitutional question, which it has overlooked, involving the denial of equal protection to grandfathered systems. Section 76.31(b) established two classes of cable systems, namely, grandfathered and non-grandfathered. This classification appears reasonable based on the Commission's efforts to balance the equities of systems in operation prior to March 31, 1972. It becomes unreasonable, however, when the grandfathered class is eliminated from the federal protection afforded non-grandfathered systems and thereby made vulnerable to heavy increases in fees which cannot be imposed upon non-grandfathered systems. Thus, the strict interpretation of §76.31(b) proffered by CCT results in unreasonable

^{22/} In State of Texas v. Grundstrom, 404 F. 2d 644, 646 (5th Cir. 1968), the Court declined to decide a constitutional issue where, in order to do so, it would have had to "assume the existence of facts and circumstances which do not exist and indeed may never actually occur." See also Langston v. Johnson, 478 F. 2d 915 (D.C. Cir. 1973).

discrimination against grandfathered systems and deprives the cable operator of the equitable right he has to rely on the status quo of his fees. Such a result is the total opposite of what the FCC intended.

In view of the reasonableness of the Commission's interpretation of §76.31(b) and the consistency of such interpretation with the repeatedly expressed purpose of this section and other grandfather clauses as well, and in light of the incongruous results caused by a literal interpretation, this Court must reject CCT's position and affirm the judgment of the FCC.

III

CCT HAS WAIVED ANY RIGHT TO ARGUE
THAT THE COMMISSION FAILED TO FOLLOW
THE ADMINISTRATIVE PROCEDURE ACT

- a) Because Of Its Failure To Raise The Issue Below, CCT Is Estopped From Contending That The Administrative Procedure Act Was Violated.

In a further effort to support its position, CCT relies upon the principle set forth in Dobbs v. Train, 409 F.Supp. 432, 436 (N.D. Ga. 1975), that "words of a statute are to be given their plain and natural meaning unless manifest injustice or absurdity would result". It argues that, by not construing §76.31(b) in a restrictive fashion, the Commission was actually amending its regulations in violation of the procedures specified in its own rules (47 C.F.R. §§1.412, 413 and 415) and the Administrative Procedure Act (APA) (5 U.S.C. §533) governing adoption of such amendments. (CCT Brief 12). CCT does not advance this argument as a separate ground for reversal, and, indeed, it cannot legally do so.

At no time during the more than two years that this proceeding was pending before the Commission did CCT argue that the rulemaking procedures had to be

followed.^{23/} Accordingly, CCT is estopped from objecting to the procedures followed by the Commission. Consideration of such an argument for the first time at the appellate level would do violence to the integrity of the administrative process and result in substantial injustice to the other parties. As the Supreme Court stated in the leading case of United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 36-37 (1952), in which it refused to consider a procedural contention in an administrative proceeding raised for the first time on appeal, such procedural issues when raised first at the appellate level and not before the agency are

. . . clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of consideration of practical justice.

* * *

Simple fairness to those who are engaged in the tasks of administration and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice. ^{24/} [Emphasis supplied].

^{23/} In fact, CCT affirmatively opposed a motion to consolidate its request for a Declaratory Ruling with the FCC's then pending rulemaking proceeding in Docket 20272, concerning the allocation of regulatory jurisdiction among federal, state and local authorities. Supplementary Joint Appendix 50-53.

^{24/} See also N.L.R.B. v. Newton-New Haven Co., 506 F.2d 1035 (2d Cir. 1974); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968); Brotherhood of Railroad Trainmen v. Central of Ga. Ry. Co., 415 F.2d 403 (5th Cir. 1969).

This well-settled principle has been followed in numerous subsequent decisions. For example, in First-Citizens Bank and Trust Company v. Camp, 409 F.2d 1086, 1088-89 (4th Cir. 1969), the court responded to the plaintiff's assertions that it did not receive a "fair" hearing from the Comptroller of the Currency by stating:

[First Citizens'] right to raise at the judicial level procedural objections not advanced before the administrative agency is suspect, because, ordinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctible at the administrative level.

Another example is found in Dobbs v. Train, *supra*, the very case relied on by CCT. The court there ruled against the contention of the United States Environmental Protection Agency (E.P.A.) that the plaintiff should be estopped from pursuing its appeal because it failed to participate in the rulemaking proceeding where the regulation in question was adopted. The court held, instead, that the plaintiff could pursue its appeal since it commenced its own proceedings before the E.P.A. In so finding, however, the court commented that

the two cases cited by the E.P.A. did not support its argument. In Dobbs, 409 F.Supp. 432, 435, the court stated:

The two cases do, however, stand for the proposition that objections to standards should be made in the first instance to the administrative agency and that courts will not entertain objections not made in the agency proceedings. United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 73 S. Ct. 67, 67 L.Ed 54 (1952); Portland Cement Association v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375 (1973). [Emphasis supplied].

The rationale of the Tucker Truck decision has also been applied in a situation similar to the instant one where a party asserted, for the first time on appeal, that an administrative decision should have been preceded by a formal rulemaking. In United States v. Elof Hansson, Inc., 296 F.2d 779, 781 (C.C.P.A. 1960), the Court refused to consider the claimed applicability of the APA, stating:

It is our opinion that the Tucker decision clearly requires that the issue here sought to be raised should have been raised by timely objection at the administrative level.

It must be emphasized that CCT itself commenced this proceeding before the Commission and therefore had the choice of the type of proceeding it wished to

utilize. It chose not to seek rule making but instead specifically petitioned for a declaratory ruling "to remove any doubt that Section 817 of the New York State Executive Law is fully consistent with Section 76.31(b)".^{25/} It filed the initial Petition for Declaratory Ruling, two separate replies and a Petition for Reconsideration without once, in any way, even suggesting that its procedure was wrong. Clearly, then, CCT cannot now be heard to complain, as the result of a decision with which it disagrees, that the procedure it chose constituted an irregularity which should be overturned.

b) Compliance With The APA Is Not Required Because The FCC's Interpretation Is Not An Amendment To §76.31(b).

However, even assuming that CCT had raised a timely objection to the Commission's procedure, it is clear that the Commission's declaratory ruling, New York State Commission on Cable Television, 59 F.C.C. 2d 1344 (1976), A. 3, and Reconsideration, did not.

^{25/} Petition for Declaratory Ruling, Supplementary Joint Appendix 9.

require compliance with the provisions of either the APA or the Commission's own rules governing rulemaking proceedings. As MCTV has demonstrated, the Commission has consistently interpreted the grandfather provisions of its rules to prevent disruptions arising after the adoption of a new regulation. The declaratory rulings to which CCT objects ~~were~~ not an amendment to §76.31(b), but merely an interpretation or explanation of the manner in which the grandfather clause therein should be applied in the particular situation posed by CCT. As the Court held in Continental Oil Company v. Burns, 317 F.Supp. 194, 197 (D. Del. 1970):

An administrative interpretation or interpretive rule is a clarification of existing laws or regulations rather than a substantive modification in or adoption of new regulations.

An administrative interpretation is expressly exempt from the procedural requirements applicable to formal rulemaking. 5 U.S.C. §§553(b)(3)(A) and 554(E); Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952); Garelick Mfg. Co. v. Dillon, 313 F.2d 899 (D.C. Cir. 1963).^{26/}

^{26/} The Commission Rules cited by CCT (§1.412, 1.413, and 1.415) are equally inapplicable. By their terms they prescribe procedures for rulemaking proceedings. Here the Commission proceeded under the authority of §1.2 of its rules concerning declaratory rulings. Moreover, CCT was not prejudiced in any way through the declaratory ruling procedure it chose. CCT had all the notice and opportunity for comment which would have been afforded in a formal rulemaking.

Accordingly, CCT has no grounds upon which to claim that its rights have been violated because the procedure followed did not incorporate the requirements of a formal rulemaking process.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE INTERPRETATION OF §76.31(b) BY THE FCC SHOULD BE AFFIRMED.

Respectfully submitted,

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ADDENDUM

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS COMMISSION

Subpart C—Federal-State/Local Regulatory Relationships

§ 76.30 Scope of application.

The provisions of this subpart shall not apply to any system community unit that constitutes all or part of a cable television system that serves fewer than 500 subscribers.

[§ 76.30 added eff. 5-16-77; XI(76)-2]

§ 76.31 Franchise standards.

(a) In order to obtain a certificate of compliance, a proposed or existing community unit shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:

(1) The franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process;

(2) The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter reasonably make cable service available to a substantial percentage of its franchise area each year, such percentage to be determined by the franchising authority; *Provided, however, That* where a franchise contains a policy of construction requiring less than complete wiring of the franchise area, such policy shall be adopted only after a full public proceeding (as contemplated by paragraph (a)(1) of this section) which includes specific notice of the consideration of such a policy.

NOTE: The proviso to this paragraph is applicable only to franchises granted after August 1, 1975.

(3) The initial franchise period shall not exceed fifteen (15) years, and any renewal franchise period shall be of reasonable duration;

(4) [Reserved]

(5) The franchise shall: (i) specify that procedures have been adopted by the franchisee and franchisor for the investigation and resolution of all complaints regarding cable television operations; (ii) require that the franchisee maintain a local business office or agent for these purposes; (iii) designate by title, the office or official of the franchising authority that has pri-

mary responsibility for the continuing administration of the franchise and implementation of complaint procedures; and (iv) specify that notice of the procedures for reporting and resolving complaints will be given to each subscriber at the time of initial subscription to the community unit.

NOTE.—Subparagraphs (iii) and (iv) of this paragraph are applicable only to franchises granted after August 1, 1975.

(6) Any modifications of the provisions of this section resulting from amendment by the Commission shall be incorporated into the franchise within one (1) year of adoption of the modification, or at the time of franchise renewal, whichever occurs first.

Provided, however, That, in an application for certificate of compliance, consistency with these requirements shall not be expected of a community unit that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first; *And provided, further, That* on a petition filed pursuant to § 76.7, in connection with an application for certificate of compliance, the Commission may waive consistency with these requirements for a community unit that was not in operation prior to March 31, 1972, and that, relying on an existing franchise, made a significant financial investment or entered into binding contractual agreements prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever comes first.

(b) Franchise fees shall be no more than 3 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a community unit that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a community unit's current franchise period, or March 31, 1977, whichever occurs first.

[§ 76.31 amended eff. 5-16-77; XI(76)-2]

See Note on Next Page

Note:

Pursuant to the Commission's Decision in Docket 21002, scheduled to become effective November 15, 1977, the mandatory provisions of §76.31(a) will be eliminated. However, the provisions pertaining to franchise award proceedings, franchise duration, construction timetables and complaint procedures will be placed in a Note to the rule and will serve as non-mandatory guidelines.

The Decision also changes the base upon which fees can be calculated under §76.31(b) from "gross subscriber revenues" to "gross revenues". Furthermore, the grandfather period of §76.31(b) is changed to fifteen years from the initial grant of the franchise or the termination date of the franchise, whichever occurs first.

None of these changes effects the interpretation at issue in this case. See FCC News Release, No. 89569 "Cable Certification and Franchise Standards Streamlined (Docket 21002)" (Sept. 26, 1977).

The Commission's Declaratory Ruling and Reconsideration at issue in this case referenced a slightly different version of §76.31 than the current version set forth above. The current version, which became effective May 16, 1977, is identical to the version referenced in the Declaratory Ruling except that the term "cable television system" has been replaced by "community unit" in the current version.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE COMMISSION ON CABLE
TELEVISION,

Petitioner,

against

FEDERAL COMMUNICATIONS COMMISSION,

Respondent,

MANHATTAN CABLE TELEVISION, INC. and
NEW YORK STATE CABLE TELEVISION
ASSOCIATION,

Intervenors.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

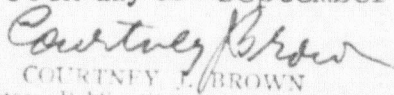
being duly sworn, deposes

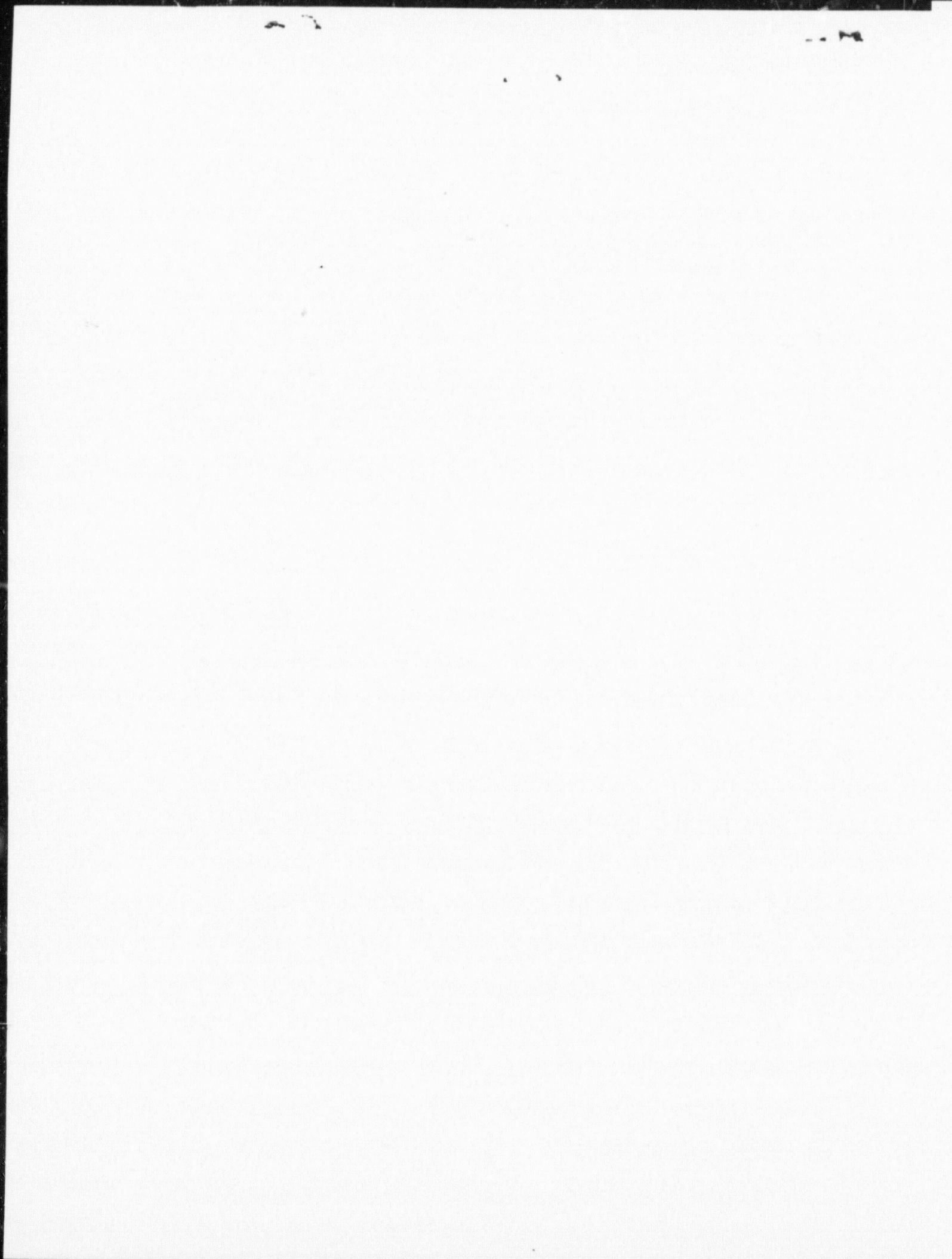
and says that he is over the age of 18 years. That on the 30th
day of September , 1977, he served two copies of the
Brief for Intervenor Manhattan Cable Television on
See attached list

the attorney s for ~~the~~ see attached list
by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney s at
No. See attached list () N. Y.,
that being the address designated by th em for that purpose upon
the preceding papers in this action.

Sworn to before me this

30th day of September , 1977.


COURTNEY J. BROWN
Notary Public, State of New York
No. 347820
Qualified in New York County
Commission Expires March 30, 1978



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